(19,932.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

REPLY BRIEF OF PLAINTIFF IN ERROR.

POINTS AND AUTHORITIES.

I.

If the allegations of a removal petition, charging that a plaintiff was guilty of fraud in alleging a joint cause of action against a resident and a non-resident defendant, are traversed by a motion to remand, such fraud must be proven by the removal petitioner

independently of the allegations in the removal petition or of the affidavits filed in support thereof.

Alabama Great Southern Ry. v. Thompson, 26 Sup. Ct. Rep. 161, l. c. 164;
Louisville etc. Ry. Co. v. Wagelin, 132 U. S. 599;
Plymouth etc. Co. v. Amador, 118 U. S. 264, 270;
Landis v. Felton, 73 Fed., l. c. 313;
Foster on Federal Procedure, Sec. 284, p. 925;
Kelly v. Railway Co., 122 Fed. 286;
Ross v. Erie R. Co., 120 Fed. 703;
Dow v. Bradstreet et al., 46 Fed. 824;
Durkee v. Illinois Central R. R. Co., 98 Fed. 1;
Arrowsmith v. N. & D. Ry. Co., 57 Fed. 170;
Free v. Western Union Telegraph Co., 122 Fed. 309;
Kansas City Ry. Co. v. Daughtery, 138 U. S. 303.

II.

The complaint states a joint cause of action. But even if it could be held upon critical analysis thereof that it fails to do so, the complaint must nevertheless be regarded as joint for purposes of removal, inasmuch as the allegations of the complaint do not disclose such palpable want of joint liability as to justify an imputation of bad faith upon the plaintiff.

Alabama Gt. Southern Ry. Co. v. Thompson, 26 Sup. Ct. Rep. 161;
Steinhauser v. Spraul, 127 Mo. 541;
Prince v. Illinois Central Ry. Co., 98 Fed. Rep. 1;
O'Neil v. Young, 58 Mo. App. 628;
Harriman v. Stowe, 57 Mo. 93;
Davenport v. Southern Ry. Co., 124 Fed. 983;
Schaefer v. Union Brick Co., 128 Fed. 97.

ARGUMENT.

I.

Burden Upon the Removal Petitioner to Show Fraud Independently of the Averments of the Verified Removal Petition.

In our original brief, we pointed out that the affidavits filed by the removal petitioner in support of its petition do not charge the plaintiff with fraud or with knowledge of any facts from which an inference of fraud may be drawn. Counsel for defendants in their brief state that we "evidently overlooked the verified petition for removal," which, as they proceed to show, does charge fraud. We did not overlook that fact. It is perfectly apparent that the verified removal petition charges fraud. But those allegations of fraud are denied by the motion to remand. An issue is thus raised as to the truth of those allegations. Upon that issue, the burden of proof was upon the removal petitioner. In the attempt to sustain that issue, the removal petitioner in support of the allegations of its petition offered as proof nothing except certain affidavits, which affidavits, as we have already pointed out, do not even charge fraud. This court has so frequently and so recently stated it to be the law that a verified removal petition does not prove itself and that the allegations of fraud therein contained must be proven by the party making them, that we regard it as unnecessary to cite or discuss authorities with a view to showing that such is the law. Therefore, even if affidavits could be regarded as proof upon such an issue, inasmuch as the affidavits filed in support of the removal petition do not at all bear upon the issue of fraud, the removal petitioner has clearly failed to sustain that issue.

In our original brief, we also take the position that, even if the affidavits filed in support of the removal petition charged fraud, such affidavits can not be regarded as proof upon that issue. Counsel for defendants contend that inasmuch as we did not object to the competency of affidavits for that purpose and ourselves filed an affidavit in opposition to those filed by the removal petitioner, we are not now in position to object that such affidavits do not constitute proof. But it would seem to be clear that where the allegations of fraud contained in the removal petition are denied by the motion to remand; and both the removal petition and the

motion to remand are verified by affidavits, the effect is merely to raise an issue as to the existence of the fraud charged; an issue in which the burden is upon the removal petitioner; and, if the removal petitioner does not offer sufficient and competent evidence upon that issue, it is not sustained, whether the plaintiff, who has the negative of the issue, should offer no evidence at all or evidence which is incompetent.

Counsel for defendants in their brief have incorporated quotations from a number of Federal cases, which quotations taken apart from the facts in the cases cited appear upon casual examination to lend color to their contention that affidavits may be regarded as proof upon the issue of fraud raised by a motion to remand. However, if those cases cited and quoted from in the brief of counsel for defendants are examined, it will be found that not one of them tends in any degree to support the proposition that where *an issue is raised* as to the truth of the allegations of fraud contained in a removal petition, affidavits may be regarded as proof upon that issue. In support of their contention, counsel for defendants cite and quote from the case of Kelly v. Ry. Co., 122 Fed. Rep. 286, 289. The excerpt quoted from that case refers to affidavits as proof. However, the motion to remand in that case stated only two grounds; first, that the removal petition was filed out of time; second, that the plaintiff and two of the defendants were citizens of Missouri. The verified removal petition charged that the allegations of joint liability were fraudulent. Such charge was not denied by the motion to remand, nor was it in any other way put in issue by the plaintiff. Therefore, the allegations of the verified removal petition as to the existence of fraud not being denied by the plaintiff, and no issue being raised by the plaintiff on that point, stood admitted. The case, therefore, can not be regarded as any authority upon the proposition, that an affidavit may be regarded as proof, in a case where the allegations of fraud contained in the removal petition are denied by the motion to remand, as is true in the case at bar.

Likewise, the cases of Ross v. Erie Ry. Co., 120 Fed. 703; Dow v. Bradstreet Co., 46 Fed. 824; Arrowsmith v. N. & D. R. Co., 57 Fed. 170; and Free v. Western Union Telegraph Co., 122 Fed. Rep. 309, all of which are cited by counsel for the defendants upon the proposition that affidavits may be regarded as proof upon an issue of fraud raised upon a motion to remand, are all cases in which, like the Kelly case, *no issue of fraud was raised* by the motion to remand. They are all cases in which the allegations of fraud contained in the removal petition *were not in any manner denied by the plaintiff*.

The case of Durkee v. Illinois Central Ry. Co., 98 Fed. 1, a case

also cited by counsel for defendants in this connection, was a case in which the issue of fraud was raised by the motion to remand, and was heard and passed upon by the Federal Court, but it does not appear in that case that upon that issue affidavits were either offered or considered.

In the case of Gustafson v. Ry. Co., 128 Fed. 85, also cited by counsel for the defense in this connection, on p. 15 *et seq.* of their brief, it appears that the United States Circuit Court passed upon the issue of fraud raised by a removal petition and a motion to remand, but it expressly appears from the opinion that the court heard oral testimony upon that issue and does not appear that affidavits were either filed or considered.

In this connection, counsel for defendants also cite the case of Kansas City Ry. Co. v. Daughtery, 138 U. S. 303. In this case Daughtery, the plaintiff, brought his suit in the State Court. A petition for removal was filed by one of the defendants, in which it was stated that the plaintiff, Daughtery, was a citizen of the same state as the removal petitioner. The removal petition was not verified by affidavit. Daughtery filed an affidavit in which he traversed the allegations of the removal petition. The State Court undertook to pass upon the issue of fraud thus raised and retained jurisdiction of the case. This court held that an issue raised upon a removal petition should be passed upon by the United States Circuit Court, and that the State Court had no jurisdiction to pass upon such issue. This court further held that, as the petition for removal was untimely, the State Court was justified in retaining jurisdiction. The case then clearly fails to lend the slightest color of support to the proposition upon which it is cited, to wit, that an affidavit may be regarded as proof upon an issue of fraud raised by a motion to remand, denying allegations of fraud contained in a removal petition. Because no motion to remand was filed. The affidavit filed was not even filed in support of the removal petition. It was filed by the opposite party; and this court merely held that the removal petition and such affidavit made an issue, which issue, if the application for removal had been timely, should have been passed upon by the United States Court.

We may, therefore confidently re-affirm our position that upon the issue of fraud raised in this case by the verified removal petition and the motion to remand, the removal petitioner offered nothing in the way of proof except certain affidavits which do not charge fraud or in any way bear upon that issue; and that, even if the affidavits so filed charged fraud, there is no authority for the proposition that such affidavits may be regarded as proof.

II.

For Purposes of Removal the Complaint States a Joint Cause of Action.

We think that the authorities cited in our original brief sufficiently demonstrate that the complaint states a joint cause of action, not only for purposes of removal but for all purposes. However, as already pointed out, under the decisions of this court, and especially under its recent decision in Alabama Great Southern v. Thompson, 26 Supt. Ct. Rep. 161, it is not necessary that the complaint should measure up to any such standard. Certain Federal Courts have laid down the doctrine that where a plaintiff has charged joint liability against a resident and non-resident defendant in a suit brought in a State Court and the cause has been removed to a Federal Court, the Federal Court should examine the petition by its four corners and critically analyze the same, and, if peradventure, upon such analysis it may be held that the plaintiff has misconceived his cause of action and has charged a joint liability in a case where the facts alleged do not bear out the claim of joint liability, then it must be held that the cause is removable; and that the plaintiff has been guilty of a fraudulent attempt to defeat the jurisdiction of the Federal Court. But this court has repeatedly refused to approve such doctrine or to enter upon any such analysis of a complaint in which a joint liability is charged; and especially in the recent case of Alabama Great Southern v. Thompson, *supra*, has expressed its opinion on that subject in terms which it seems to us are so clear that they can not be misunderstood. Under the decision in that case, whatever the court which has final jurisdiction of a case in which joint liability is charged may decide from an analysis of the complaint as to the existence or non-existence of joint liability, the complaint must for purposes of removal be regarded as stating a joint liability, unless the allegations therein contained so palpably disclose a want of the same as to justify an imputation of bad faith upon the plaintiff.

Upon the question as to whether or not the complaint in this case discloses any such palpable want of joint liability, if no cases were cited and none were considered by this court except those cited by counsel for the defense, it would be absolutely clear that the complaint herein does not palpably disclose the non-existence of joint liability, and that upon a critical analysis of the complaint measured by the rules laid down in the cases cited by the defense, the question as to the existence or non-existence of joint liability is at least a doubtful one, is at least such a question as one may be permitted to raise without laying himself liable to the imputa-

tion of fraud; and we think that it may well be contended that even the defendants' cases tend to show that the complaint actualy sets forth a case of joint liability for all purposes whatsoever. Consider, for instance, the Missouri cases cited by the defense. Upon the proposition that the complaint in this case charges the servant Wettengel with mere nonfeasance, for which he is not at all liable to the plaintiff, much stress is laid upon the case of Steinhauser v. Spraul, 127 Mo. 541. In this case the defendant was the wife of the plaintiff's employer. The defendant directed the plaintiff to get some pigeons out of a loft. In attempting to get the pigeons, plaintiff made use of a ladder which it was charged was too long and for that reason not reasonably safe for the purpose and that, therefore, the defendant was guilty of negligence in directing plaintiff to get the pigeons. The ladder was not furnished by the defendant for that purpose. It was furnished by her husband, plaintiff's employer, and had often been used by the plaintiff for that purpose before. The ladder was sound and the danger incident to its use consisted rather in the manner of its use than in the appliance itself. It was held by a divided court that the defendant was not liable. One of the opinions delivered in the case, written by Judge Sherwood, bases the holding of non-liability upon three grounds:

1. The acts charged against the defendant amounted to nonfeasance.

2. The appliance was, under the circumstances, reasonably safe.

3. The danger, if any, incident to its use was patent and was, therefore, assumed as ordinarily incident to the employment.

The case was heard by seven judges of the Missouri Supreme Court; only one of these judges concurred with Judge Sherwood in the holding of non-liability upon the first ground stated. Two concurred in the result, but expressly based their concurrence upon the two latter grounds; three dissented. That part of Judge Sherwood's opinion which counsel for defendants quote as the opinion of the court, and which discusses the question as to whether or not defendant was guilty of misfeasance or of mere nonfeasance, *is not the opinion of the court;* it merely represents the views of two of the seven judges who sat upon the case. Furthermore, it will be noted that Judge Sherwood, in the sentence quoted by counsel for defense, on page 26 of their brief, and which is the last sentence of the first paragraph on that page, speaks of "aggressive and positive omission." The sentence containing these words is not, in the opinion, incorporated in the same paragraph with the excerpt from the opinion which immediately precedes it. Between the words, "But as a wrongdoer," and the words, beginning the following sentence, "of course, no

such aggressive and positive omission," which appear on page 26 of the brief of counsel for defendants, there occurs in the opinion about eight pages of discussion. Counsel do not in any way indicate this break in the quotation, but put in utterly disconnected parts of the opinion as if the matter was all contained in one paragraph. If that part of Judge Sherwood's opinion is read in this connection, it can be more readily understood as to what he means by the expression *"aggressive and positive omission."* It will be clear from a consideration of that discussion that by "aggressive and positive omission" the writer of the opinion meant a negligent omission by an agent or servant in the course of the performance of any task which the servant had undertaken under such circumstances that the omission was likely to prove injurious to third persons. From a consideration of the entire opinion, it is clear that the writer recognizes the law to be that in such a case a negligent omission is not mere nonfeasance but is the same in effect as a positive act and amounts to misfeasance. The principles of law announced, it seems to us, clearly support our position that, if, as alleged in the complaint, the defendant Wettengel was charged by the National Enameling and Stamping Company with the duty of planning the construction of this furnace structure, and actually entered upon the performance of that duty, and so negligently planned the construction of that structure that it was not a reasonably safe place for the plaintiff to work, if his negligence may be regarded as in any sense negligence of omission, the omission was under such circumstances that injury to some third person was likely to result and was, therefore, an act of misfeasance.

Counsel for the defense also cite and quote from the Missouri case of O'Neil v. Young, 58 Mo. App. 628. (Defendants' brief, p. 23.) In that case the plaintiff was injured by the breaking of an elevator rope. Suit was brought against the Company owning the elevator and against Young, its President, who directed the plaintiff to carry up a quantity of glass in the elevator, in the carrying of which the rope broke and plaintiff was injured. It was not charged in the complaint that Young was under any duty to inspect the rope. The recovery seems to have been sought against him on the ground that he was negligent in ordering the plaintiff to take up a load beyond the capacity of the elevator. Nevertheless, Judge Biggs, who wrote one of the three opinions delivered in the case, undertakes to discuss the question as to whether or not, if Young had been charged with such duty, and had negligently inspected the rope, he would be guilty of misfeasance or of nonfeasance. And Judge Biggs expresses the view that Young's negligence was mere nonfeasance for which he would not be liable. Judge Rombauer, who also wrote an opinion in the case, pays no attention to this

question. Judge Bond, the other of the three judges, who also wrote an opinion, takes a position exactly opposite to that taken by Judge Biggs, from whose opinion counsel for the defense quote in their brief. Judge Bond, l. c. 639, 640, says:

> "I also hold that, for lack of reasonable care in inspecting the elevator, John Young would be liable to the corporation of which he was general manager, but for going further and ordering plaintiff to use an elevator, whose unfit condition might have been known by ordinary diligence on the part of John Young, he became guilty of active negligence and was, therefore, jointly liable with the corporation for the injuries caused by obedience to his directions on the part of plaintiff. This is the rule announced by the supreme court. Steinhauser v. Spraul, 114 Mo. 551."

Upon this question of misfeasance and nonfeasance, counsel for defense also quote from the Missouri case of Harriman v. Stowe, 57 Mo. 93, a case in which the defendant, acting as agent of another, had negligently constructed a cellar door and as a result of which negligent construction, the plaintiff, passing over the door, fell and was injured. It was held that such negligence of defendant was not a mere omission for which defendant was responsible only to his employer, but the omission to make the door reasonably safe, which defendant had undertaken to construct, amounted to positive misfeasance, for which defendant was liable to a third person.

If the negligent omission to construct in a reasonably safe manner a door or hatchway is such an omission as amounts to misfeasance, how can it be contended that the negligent omission to construct with reasonable safety the furnace structure upon which plaintiff was employed was not also such an omission as amounted to misfeasance; and if the defendant Wettengel planned that furnace structure, upon what principle of law can it be held that he is not liable for the negligent manner in which that structure was made, if he would be liable for an omission to use due care in constructing a doorway, as a result of which omission some third person was injured?

Such are the Missouri cases cited in the brief for the defense upon the proposition that the acts charged against the defendant Wettengel in this case so clearly amount to mere nonfeasance that the plaintiff and his counsel must be held to be guilty of fraud in the making of such allegations. The extract quoted by counsel for defendants from the case of Steinhauser v. Spraul, *supra*, the one upon which they appear most to rely, is not the opinion of the court, but the opinion of only two out of the seven judges who sat upon the case, and even that part of the opinion which relates to

the subject of misfeasance and nonfeasance, when properly considered, does not tend to show that the act charged against the defendant Wettengel in this case is mere nonfeasance.

In the case of O'Neil v. Young, *supra*, another case relied upon, what is quoted as the opinion of the court is the opinion of only one of the three judges who sat upon the case, and is directly contrary to the opinion of another of the three.

The Missouri case of Harriman v. Stowe, is so far from supporting the defendants' contention that it would be difficult to find a stronger case in support of the proposition that the acts charged against the defendant Wettengel amount to misfeasance.

We consider it unnecessary to further prolong the discussion by an analysis of cases from other jurisdictions. It seems to us that there is really no ground for a serious contention that the allegations of the complaint in this case so clearly show want of joint liability as to justify the imputation that plaintiff and his counsel were guilty of fraud in attempting to hold the individual defendant and the defendant Company jointly liable.

Respectfully submitted,

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